



State of Wisconsin
Scott McCallum, Governor

Department of Agriculture, Trade and Consumer Protection
James E. Harsdorf, Secretary

DATE: June 24, 2002

TO: Board of Agriculture, Trade and Consumer Protection

FROM: James Harsdorf, Secretary
Fran Tryon, Administrator,
Division of Trade and Consumer Protection

SUBJECT: Telemarketing “No-Call” List; Final Draft Rule

At the July 9, 2002 Board meeting, the department will ask the Board to approve a final draft rule related to the creation of a telemarketing “no call” list. The Legislature directed the department to create the “no call” list. This rule prohibits telemarketers from calling consumers who sign up. Approximately 1 million Wisconsin consumers are expected to participate. The department hopes to have this rule in effect and begin sign-ups by November 1, 2002.

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently regulates unfair and deceptive business practices under s. 100.20, Stats. DATCP has adopted rules, under ch. ATPC 127, Wis. Adm. Code, to protect consumers against unfair telemarketing practices.

Under s. 100.52, Stats., the Legislature has directed DATCP to create a telemarketing “no call” list. Consumers may contact DATCP to sign up for the “no call” list. Telemarketers may not call consumers whose telephone numbers appear on the list. Telemarketers must register with DATCP and pay fees to finance the list compilation and distribution. On a regular periodic basis, DATCP must update the list and distribute it to registered telemarketers. DATCP must adopt rules to implement this program.

This rule implements the “no call” program mandated by the Legislature. The rule augments DATCP’s current telemarketing rules under ATPC 127. DATCP held public “listening sessions” and contacted other states before it started drafting the rule. On March 12, 2002, the DATCP Board approved a draft for public hearing. DATCP held 12 public hearings in Madison, Eau Claire, Green Bay, Milwaukee, Wausau, and LaCrosse. Based on hearing comments, DATCP prepared this final draft rule. The final draft highlights changes from the hearing draft.

DATCP must register and charge fees to telemarketers, to cover the anticipated cost of the “no call” program. DATCP has obtained competitive bids and will contract with a private vendor to handle consumer sign-ups for the “no call” list. DATCP estimates that there are approximately 600 telemarketing firms calling consumers in this state. This rule establishes telemarketer registration fees based on this estimate. DATCP may reduce the fees if revenues exceed expectations.

Rule Contents

“Telephone Solicitations” Covered

This rule regulates “telephone solicitations” to persons located in this state, regardless of where the calls originate. A “telephone solicitation” means an unsolicited telephone call for the purpose of encouraging the call recipient to buy property, goods or services, or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services. “Telephone solicitation” does not include any of the following:

- A telephone call encouraging the call recipient to buy property, goods or services from a nonprofit organization if sales proceeds are not subject to Wisconsin sales tax or federal income tax.
- A telephone call made by an individual acting on his or her own behalf, and not as an employee or agent for another person. This exemption does *not* apply to a caller who does any of the following:
 - Sells or promotes the sale of property, goods or services for others.
 - Sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller’s sales methods.
- A telephone call made in response to the call recipient’s request for that call.
- A telephone call made to a current client who has agreed to receive property, goods or services of the type promoted by the telephone call.
- A telephone call made to a number listed in the current local business telephone directory.
- One telephone call to determine whether a former client mistakenly allowed a contractual relationship to lapse.
- A telephone call made to determine a former client’s level of satisfaction, unless the call is part of a plan or scheme to encourage the former client to buy more property, goods or services.

Telemarketers Must Register

This rule requires telemarketers to register annually with DATCP. A registration expires on November 30 of each year. Under this rule:

- A firm must register annually with DATCP if the firm employs or contracts with individuals to make telephone solicitations to residential customers. A firm that sells property, goods or services may register on behalf of another firm that hires individual telemarketers to promote sales by the registering firm.

For example, an insurance company may register on behalf of a local insurance agency whose employees telemarket that company's insurance. But that registration does not cover the local agency's employees when they telemarket another company's insurance.

- No individual may make a telephone solicitation to a residential telephone customer unless the telephone solicitation is covered by a registration under this rule.

Telemarketer Registration Form

To register with DATCP, a firm must complete an annual registration form and pay annual fees. The registration form must include all the following:

- The registrant's correct legal name, and all trade names under which the registrant does business.
- The registrant's principal business address and telephone number. The business address must include street address, zip code, state or province, and nation.
- The registrant's federal tax identification (FEIN) number.
- The name and address of the registrant's registered agent in this state, if any.
- The name and address of a person who will accept service of process on behalf of the registrant, if other than a registered agent in this state.
- The name, address and telephone number of a person who may respond, on behalf of the registrant, to DATCP notices and inquiries.
- The number of telephone lines that will be used to make telephone solicitations under the registration. The registrant must provide the telephone number associated with each of the lines.
- The number of individuals who will make telephone solicitations under the registration. The registrant must provide the names of the individuals if DATCP requests those names.

- A statement indicating the form in which the registrant wishes to receive “no-call” lists. A registrant may receive “no-call” lists in one or more of the following forms:
 - By e-mail transmission to an e-mail address provided by the registrant.
 - As a compact disc, mailed to an address provided by the registrant.
 - In hard-copy printed form, mailed to an address provided by the registrant.

Telemarketer Registration Fees

A firm registering with DATCP must pay the following annual fees, or an annual fee of \$20,000, *whichever is less*:

- A basic annual registration fee of \$700 for the first year of registration, and \$500 for each year thereafter.
- A supplementary fee of \$75 for each telephone line used to make telephone solicitations under the registration. This fee does not apply if fewer than 4 telephone lines will be used.
- A supplementary fee of \$25 for each e-mail address to which the registrant would like DATCP to send the “no-call” list (if more than one e-mail address).
- A supplementary fee of \$25 for each address to which the registrant would like DATCP to send the “no call” list in compact disc form.
- A supplementary fee of \$1,000 for each address to which the registrant would like DATCP to send the “no-call” list in hard-copy print form.

DATCP may reduce the fees charged to registrants in any registration year (beginning December 1) if DATCP projects that the balance in its fee revenue appropriation at DATCP’s next fiscal-year-end (June 30) will exceed DATCP’s total projected expenditures for the “no call” program in that fiscal year by more than 15%.

The “No-Call” List

DATCP must compile a “no-call” list containing the telephone numbers and ZIP codes of residential telephone customers who sign up for the list. No person may make a telephone solicitation, either directly or through an employee or agent, to a residential customer whose telephone number appears on the current no-call list.

A residential telephone customer may contact DATCP by phone, or at DATCP’s website, to sign up for the “no-call” list. A customer’s caregiver may sign up on behalf of the customer. The customer or caregiver must give DATCP all the following information:

- The customer's telephone number including area code.
- The customer's ZIP code.
- The customer's name and address, if requested by DATCP. *This information is not included on the "no-call" list, but may be requested for verification purposes.*
- The caregiver's name and address, if a caregiver contacts DATCP on behalf of the customer. *This information is not included on the "no-call" list, but is required for verification purposes.*

Distributing the List

DATCP must distribute the "no-call" list to each firm that is currently registered with DATCP. DATCP must distribute the list in the manner specified by the registrant (assuming that the registrant pays the required fees for that method of delivery). A "no-call" list takes effect on a date specified by DATCP, not sooner than 10 business days after DATCP distributes the list.

Updating the List

DATCP must compile and distribute an updated "no-call" list every 3 months. DATCP must distribute updated lists in the same manner as the initial list. DATCP must delete a residential telephone customer from the "no-call" list 2 years after that customer last signed up for inclusion on the list. A customer may renew at any time.

No Unauthorized Release

A registered telemarketer may not redistribute any part of a "no-call" list to any other person, except that the registrant may redistribute the list to a person covered by the registration. DATCP may not release a "no-call" list, or any information used to compile the list, except that:

- DATCP may release a "no-call" list to firms currently registered with DATCP.
- DATCP may release a "no-call" list as necessary to enforce this rule, or to comply with a subpoena or judicial process, subject to such protective orders as may be necessary to ensure the confidentiality of the list.
- DATCP may release the "no-call" list to the federal trade commission or other federal agency maintaining a national "no-call" list (if any).

Telephone solicitation practices

Telemarketers must comply with current DATCP telemarketing rules under ch. ATCP 127, Wis. Adm. Code. In addition, this rule prohibits telemarketers from doing any of the following:

- Making telephone solicitations to a residential telephone customer, unless the telemarketer is registered with DATCP or covered by a current registration.
- Making a telephone solicitation to a residential telephone customer whose telephone number appears on the current “no call” list.
- Using an electronically prerecorded message in a telephone solicitation to a residential or nonresidential telephone customer without the prior consent of that telephone customer.
- Failing to disclose, at the request of a residential telephone customer receiving a telephone solicitation, the telemarketer’s Wisconsin registration number.
- Making a telephone solicitation to a nonresidential telephone customer (business customer) if the nonresidential telephone customer has notified the telemarketer by mail that the nonresidential telephone customer does not wish to receive telephone solicitations. A telemarketer must provide a nonresidential telephone customer with the telemarketer’s mailing address within 10 days after the customer requests it.
- Requiring, instructing or authorizing any person to make a telephone solicitation in violation of this rule, or facilitating a violation of this rule by any person.
- Using caller-ID blocking when making a telephone solicitation.

Telemarketer Records

Under current DATCP telemarketing rules, telemarketers must keep certain records for at least 2 years and must make those records available to DATCP upon request. Among other things, a telemarketer must keep records related to individuals who make telephone solicitations as employees or agents of the telemarketer, including names, addresses, telephone numbers, job titles, and fictitious names if any (no two individuals may use the same fictitious name). This rule requires telemarketers to comply with current record keeping requirements.

Hearings

DATCP held 12 public hearings in Madison, Eau Claire, Green Bay, Milwaukee, Wausau, and LaCrosse to solicit comments and opinions from affected consumers and businesses. 134 people registered at the hearings. DATCP also received written and electronic comments from 143 persons and groups, including two legislators and two sheriff deputies.

52 participants opposed any rules. 91 participants supported the rules and asked DATCP to grant no exemptions from the rules. 119 participants expressed partial support or partial opposition, but sought changes (such as exemptions). 15 other participants sought changes without registering support or opposition. A hearing summary is attached as *Appendix A*.

Changes from Hearing Draft

DATCP made a number of changes in the final draft rule. Those changes are highlighted in the attached final draft. Although many businesses requested exemptions, DATCP has intentionally limited the number of exemptions in order to protect consumers from unwanted telephone calls and to maintain a “level playing field” between competing businesses.

The final draft rule:

- Clarifies the technical definition of “telephone call” and “telephone line” based, in part, on information provided by the Wisconsin Public Service Commission.
- Removes a restrictive definition of “nonprofit organization.” The final draft clarifies that sales solicitations by a nonprofit organization are exempt unless the sale proceeds are subject to Wisconsin sales tax or federal income tax. Bona fide *charity* solicitations were already exempt, because the “no call” law applies only to telemarketing calls promoting *sales* of property, goods or services (not charity *donations*).
- Changes and limits the prior exemption for “sole proprietors.” The final draft rule exempts a telephone call made by an individual acting on his or her own behalf, and not as an employee or agent for any other person. This exemption does *not* apply to a caller who does any of the following:
 - *Sells or promotes the sale of property, goods or services for others.* For example, self-employed insurance agents are *not* exempt from this rule when they or their employees telemarket insurance for insurance companies. But an insurance company may register and pay fees on behalf of self-employed insurance agents (and their employees) who telemarket the company’s insurance.
 - *Sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller’s sales methods.*
- Clarifies the prior exemption of calls made to current “clients.” The final draft defines a “client” as a person who has a current agreement to receive (from the caller or the person on whose behalf the call is made) property, goods or services of the type promoted by the telephone call. The final draft also clarifies that certain calls to former clients are exempt, unless they are part of a plan or scheme to make new sales.
- Changes the annual registration cycle, so each registration year begins on December 1 rather than January 1. This will make it possible for DATCP to distribute “no-call” lists to current registrants beginning January 1.
- Reduces registration fees to \$700 (from \$800) for the first year and \$500 (from \$600) for each subsequent year. The final draft also reduces the per-line charges to from \$100 to \$75 annually.

- Places a \$20,000 ceiling on annual registration fees (there was no ceiling on fees in the hearing draft).
- Allows DATCP to reduce annual registration fees in any registration year if DATCP's projected fiscal year end balance exceeds DATCP's projected fiscal year expenditures by more than 15%.
- Requires registrants to notify DATCP of material changes in registration information that occur during the registration year, and pay any additional fees owed for the registration year as a result of the changes.
- Gives telemarketers at least 10 *business* days (not just 10 days) to implement updated "no call" lists received from DATCP. DATCP may set later implementation deadlines as appropriate (all telemarketers must meet the same deadline).
- Eliminates a proposal requiring telemarketing firms to record the time periods during which individuals engaged in telemarketing activities. Telemarketing firms must still keep other records related to individual telemarketers, including names, addresses and job titles.
- Makes other technical drafting changes.

Small Business

This rule will have a fiscal and operational impact on many small businesses involved in telemarketing. This rule prohibits telemarketing calls to consumers who sign up for the "no call" list. With very limited exceptions, telemarketers must register with DATCP and pay fees. Fees are based on the number of telephone lines used, so small businesses will generally pay less than larger businesses. Small businesses with fewer than 4 lines will pay no line fee at all.

Currently, businesses that telemarket must maintain a "no call" list with the names of consumers who have told them not to call again. Under this rule, telemarketers must also refrain from calling consumers identified on DATCP's "no call" list. This may require one-time expenditures for systems to maintain both lists. A complete small business analysis is attached.

DATCP has intentionally limited the number of exemptions provided to businesses, in order to protect consumers from unwanted telephone calls and to maintain a "level playing field" between competing businesses.

Fiscal Estimate

This rule will have a significant fiscal impact on DATCP. DATCP estimates that approximately 1 million consumers will sign up for the "no-call" list. DATCP has obtained competitive bids and will contract with a private vendor to handle consumer sign-ups for the "no call" list. DATCP estimates that these costs, together with costs to administer and enforce the law, will average \$543,900 annually.

DATCP must charge telemarketer registration fees to cover these costs. DATCP estimates that approximately 600 telemarketers (of various sizes) will register each year. Based on this estimate, DATCP has proposed registration fees to cover its anticipated costs. Because the program involves high initial start-up costs, DATCP estimates that the program will run a deficit for the first year, but that fee revenues will subsequently be sufficient to repay the deficit and maintain a (modest) positive annual balance. A complete fiscal estimate is attached.

Next Steps

If the Board approves this final draft rule, the department will transmit the rule for legislative committee review. If the Legislature takes no action to stop the rule, the department will sign the final rulemaking order and transmit it for publication. The rule will take effect following publication in the Wisconsin Administrative Register. The department hopes to have this rule in effect and begin consumer sign-ups for the “no-call” list by November 1, 2002.